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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 676

GIBRALTAR INDUSTRIES, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Gibraltar Industries, Inc., prays that a writ of certiorari issue to review the decision and decree of the United States Court of Appeals for the Fourth Circuit, entered on August 23, 1962, enforcing an unfair labor practice order issued by the National Labor Relations Board.

OPINIONS BELOW

The opinion of the court below (Appendix A, infra, pp. 23-29) is reported at 307 F. 2d 428. The Decision and Order of the Board (R.A. 1-65)[1] are reported at 133 NLRB 1527.

[1] The reference "R.A." designates the portion of the record printed as an appendix to the brief of the National Labor Relations Board in the court below.

JURISDICTION

The decision and order of the court below (Appendix A, infra, pp. 23-29) and its decree (Appendix A, infra, pp. 30-31) were entered on August 23, 1962. On October 26, 1962, by Order of Mr. Chief Justice Warren, the time for filing the Petition for Writ of Certiorari herein was extended to December 21, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 146, 29 U.S.C. 160(e)), hereinafter called the Act.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board, as a matter of law, may find that a business entity is a joint employer of certain employees within the meaning of Section 2(2) of the National Labor Relations Act, as amended, if such entity is not an employer of the employees under common-law principles and standards.

2. Whether there is substantial evidence on the record considered as a whole to support a finding that Gibraltar Industries, Inc. is the employer of the affected employees under common-law principles and standards.

3. Whether the National Labor Relations Board's finding herein that Gibraltar Industries, Inc. is a joint employer with International Trailer Company, Inc. of the affected employees is supported by substantial evidence on the record considered as a whole.

STATUTE INVOLVED

The pertinent provisions of the original National Labor Relations Act, 49 Stat. 449, and the National Labor Relations Act, as amended, 61 Stat. 136-162, 29 U.S.C. Sec. 151 *et seq.* are set forth in Appendix B, *infra*, pp. 32-33.

STATEMENT

A. *The Facts*

International Trailer Company, Inc. (hereafter International), which was wholly owned by its President, James Fyle, had been engaged for several years in the manufacture of mobile homes and commercial trailers at its plant in Baltimore, Maryland. In December, 1958, Gibraltar Industries, Inc. (hereafter Gibraltar) was formed by Charles F. Painter and E. B. Jeffress to engage in business as a wholesale mobile-home dealer (R.A. 113-114). On December 16, 1958, International, Gibraltar and Painter executed a contract which provided that International would produce a stated number of mobile homes per month according to mutually agreed upon specifications upon written order from Gibraltar, that International would sell its mobile homes exclusively to Gibraltar, that Gibraltar would buy mobile homes only from International and that Painter would indemnify suppliers and manufacturers from whom International purchased supplies and equipment (R.A. 68-71).

Gibraltar established an office in the same building as International's office, for which it paid rent to International; it was a separate office with a separate entrance and different street number (R.A. 114; P.A. 1-3, 9).[2] Painter spent very little time at this office prior to 1960; he was concerned with the operations of his dealers and retail lots. Jeffress was more concerned with the operation at International. However, by late 1959, Jeffress was dissatisfied and wanted to get out. The causes of his dissatisfaction were that International had failed to meet the production quota established in the agreement, the quality of the

[2] The reference "P.A." designates the portion of the record printed as an appendix to the brief of Petitioner (Gibraltar) in the court below.

mobile homes it produced was not satisfactory, and Jeffress and Fyle did not get along. As a result, Painter bought out Jeffress and became the owner of 98% of Gibraltar's stock. From then on, he spent more time at the Gibraltar office which was located adjacent to International's office (R.A. 114-115).

Meanwhile, during 1959, both Painter and Gibraltar had been advancing large sums of money to International. As security for these loans, Painter received a chattel mortgage on most of International's equipment (R.A. 72-74), and also a pledge of James Fyle's stock in International as collateral (R.A. 80-81).

International's financial condition continued to grow worse and, as a consequence, Painter had to take on more financial responsibility in connection with International's operations. Gibraltar and Painter began to pay some of International's suppliers directly, and also began advancing cash to meet International's net weekly payroll (R.A. 105-106). Because International's credit had become suspect among dealers and suppliers, the signs on the plant, trucks and completed mobile homes were changed from International to Gibraltar (R.A. 117-118). International was in substantial arrears in its rental payments and when its lease expired in August, 1960, the owner of the premises refused to rent to International any longer. Gibraltar then took over the lease and the obligation to pay the back rent (R.A. 116-120).

Gibraltar took credit on the books of International against future delivery of mobile homes for all of these sums which were advanced by it in International's behalf (R.A. 105, 119).

After Jeffress left the business, Painter became more involved in International's production problems. Although

he spent most of his time in the office, he did spend some time out in the production areas. When he observed what appeared to him to be mistakes or inefficiency, he took steps to correct the situation. For the most part, these steps consisted of suggestions and instructions to the plant superintendent, Stutsman; on rare occasions, he spoke directly to the employee involved (R.A. 142-143). His interest in International's production was to insure that Gibraltar got a good trailer to sell (P.A. 3).

Painter did not supervise any of International's employees in their daily work (R.A. 3). He did exercise some influence over personnel policies of International indirectly through his financial interest and control, and on occasion, directly in connection with supervisory and administrative employees. He was present, along with Lee, International's accountant, Foster, International's attorney, Horace Fyle, International's assistant production manager and James Fyle, at an interview with Stutsman, who was hired to replace the previous plant superintendent (R.A. 129-130). Painter also vetoed a salary increase which James Fyle had given himself as President of International (R.A. 127-129). On another occasion, Painter, Stutsman and Horace Fyle decided that James Fyle's former secretary should not be rehired although James Fyle wanted to rehire her (R.A. 157-158). Painter replaced International's purchasing agent with an employee of his own (R.A. 163-164), and persuaded McDonald, International's paint foreman, not to quit by getting him a salary increase (R.A. 169-170). On one occasion only, Painter had something to do with the hiring of a rank and file employee; on that occasion, a painter was needed and Painter told Stutsman to hire a particular boy (R.A. 167-168).

Painter never owned stock in or exercised any voting rights in International, was never an officer or director of

International, never attended a stockholders or board of directors meeting, and never received any salary from International (P.A. 3). Gibraltar had separate records and books of account from International. There were other large creditors in addition to Painter and Gibraltar who had advanced money to International against the delivery of finished trailers (P.A. 6-9).

In November, 1960, Painter began foreclosure proceedings against International on his chattel mortgage. The following month Painter bought all of the items covered in the mortgage at public auction. On December 2, 1960, International ceased doing business and a few days thereafter all former International employees went to work for Gibraltar, continuing to do the same work they had done for International (R.A. 108-111).

During 1960, the International Association of Machinists (hereafter Union), began organizational activities among the employees of International, and on August 15, 1960 wrote Fyle a letter requesting recognition. Fyle declined to recognize the Union. During August of 1960 certain employees of International were discharged, and Fyle and Painter engaged in certain anti-union conduct.

Upon charges filed by the Union, the Board issued a complaint against International and Gibraltar on November 18, 1960, alleging that they had jointly and severally engaged in unfair labor practices within the meaning of Section 8(a)(1), 8(a)(3) and 8(a)(5) of the Act.

B. *The Trial Examiner's Findings and Conclusions* (R.A. 11-66)

The Trial Examiner found that International had violated the Act as alleged. However he found that Gibraltar was not a joint employer of the affected employees as al-

leged by the General Counsel and therefore was not guilty of any violation of the Act.

The Trial Examiner concluded as follows:

> "Gibraltar and International are separate legal entities. It is clear that neither Gibraltar nor Painter own any of the stock of International. Painter never served as a director or officer of International, nor Fyle of Gibraltar, neither Painter nor Gibraltar hired or fired any of International's employees, or exercised any control over their work, nor exercised any control over International's operations except that of an unwilling creditor who closely and carefully inspected the manufactured product upon which depended a return of the money it had advanced to an enterprise gone sour. The fact that Painter insisted that International's assets not be wasted on employing individuals he thought had better not be employed and that valuable employees be rewarded by paid vacations or the granting of promised pay raises, shows not control but a natural desire to protect himself. Upon all the evidence the undersigned recommends that the complaint be dismissed insofar as it alleges that Gibraltar was a joint employer with International" (R.A. 26).

The Trial Examiner did find, however, that Gibraltar "took over" the operations of International in December, 1960 with full knowledge of the charges and complaint and had first hand knowledge of the unfair labor practices by reason of the participation of Painter therein. On the basis of this finding, the Trial Examiner held that Gibraltar became responsible for remedying International's unfair labor practices and recommended a remedial order against Gibraltar.

C. *The Board's Decision and Order* (R.A. 1-10)

The Board, contrary to the Trial Examiner, found that Gibraltar and International were joint employers based on

the economic relationship between them, the control exercised by Gibraltar over the employees involved and the participation by Painter in the unfair labor practices. The Board, in view of this finding, deemed it unnecessary to consider the Trial Examiner's finding that Gibraltar "took over" the operations of International and his recommendations with regard thereto.

The Board issued a cease and desist order and remedial order against Gibraltar and International jointly.

D. *The Decision of the Court Below*
(Appendix A, *infra*, pp. 23-29)

The Court below granted enforcement of the Board's order. In the Court's view, the case raised only a substantial evidence question and it concluded that there was substantial evidence to support the Board's conclusion that Gibraltar and International were joint employers of the affected employees.

REASONS FOR GRANTING THE WRIT

1. *The Decision Of The Court Below Involves An Important Question Of Federal Law Which Has Not Been But Should Be Settled By This Court.*

The decision of the court below involves an important question of interpretation of the National Labor Relations Act, as amended, which has not been, but should be, settled by this Court. That question is whether the National Labor Relations Board may find that one business entity is the joint employer of the employees of a different and separate business entity for the purposes of the National Labor Relations Act, as amended, if the first business entity is not the employer of those employees under common-law principles and standards. This is not simply a question of whether, in a particular case, the Board's find-

ing is supported by substantial evidence on the record as a whole; it is a question of the correct meaning of Section 2(2) of the Act. The interpretation given by the Board to Section 2(2) in this and other cases is inconsistent with the intention of Congress as evidenced by the amendment of Section 2(2) in 1947. The decision affects the status under the Act of numerous individuals, corporations and other business associations throughout the United States which have entered into contractual, financial and other business relationships with one another, totally unrelated to labor relations, personnel or employment problems.

The original National Labor Relations Act (49 Stat. 449) provided in Section 2(2) that the term "employer" included "any person acting in the interest of an employer, directly or indirectly". Section 2(3) of that Act defined the term "employee", but did not do so in specific terms. Under these provisions, the Board interpreted both terms broadly in the framework of the general purposes of the statute, rejecting the argument that it was bound by or limited to the common law meanings of these terms. The Board held employers liable for acts committed by a variety of persons, both employees and strangers, for whose acts the employer would not have been responsible under common law principles.[3] In other cases, the Board held respondents to be employers or joint employers of, and liable for unfair labor practices against, employees who were not employed by them under common law standards.[4]

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[3] See, e.g., *The Serrick Corporation*, 8 NLRB 621 (1938) (employees); *Western Cartridge Co.*, 43 NLRB 179 (1942) (city official); *Reliance Mfg. Co.*, 28 NLRB 1051 (1941) (citizens committee).

[4] See, e.g., *Hearst Publications, Inc.*, 39 NLRB 1256 (1942); *Gluek Brewing Co.*, 47 NLRB 1079 (1943); *Condenser Corp. of America*, 22 NLRB 347 (1940); *Long Lake Lumber Co.*, 34 NLRB 700 (1941).

The courts, including this Court, relying upon the Board's expertise, generally sustained the Board's reasoning in these decisions. Thus, in *International Association of Machinists v. N.L.R.B.*, 311 U.S. 72, this Court found that an employer could be held responsible for unfair labor practices due to acts of employees which might not be attributable to him on strict application of the rules of *respondeat superior*. The Court said (at p. 80):

> "We are dealing here not with private rights . . . nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants, but with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination or influence."

In *Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485, 489, this Court, in considering the question of whether foremen were employers, stated the following as to the meaning of Section 2(2) as it then appeared in the Act:

> "The purpose of Section 2(2) seems obviously to render employers responsible in labor practices for acts of any persons performed in their interests. It is an adaptation of the ancient maxim of the common law, *respondeat superior*, by which a principal is made liable for the tortious acts of his agent and the master for the wrongful acts of his servants. Even without special statutory provision, the rule would apply to many relations. But Congress was creating a new class of wrongful acts to be known as unfair labor practices, and it could not be certain that the courts would apply the tort rule of *respondeat superior* to those derelictions. Even if it did, the problem of proof as applied to this kind of wrongs might easily be complicated by questions as to the scope of the actor's authority and of variance between his apparent and his real authority. Hence, it was provided that in administering this act the employer, for its purposes, should be not

> merely the individual or corporation which was the employing entity, but also others, whether employee or not, who are 'acting in the interest of an employer'."

This Court has not had occasion to consider a decision by the Board wherein, as in the instant case, the Board found separate entities to be joint employers for the purposes of the Act. However, several such cases were decided by Courts of Appeals under the original Section 2(2) of the Act.[5] In *N.L.R.B. v. Gluek Brewing Co.*, 144 F. 2d 847, 855 (8th Cir. 1944), the court stated, in upholding the Board's finding that a contract hauler who accepted delivery business from an employer was a joint employer and jointly liable with the actual employer for unfair labor practices committed against his employees:

> "Common law or statutory concepts of legal relationships must yield insofar as is necessary to effectuate the purposes of the Act. The intent that the Act should be so applied is evidenced by the definitions of 'employer' and 'employee' as stated in Section 2(2, 3) of the Act. . . ."

Section 2(3) of the original Act, which defined the term employee but did not do so in specific terms, was also broadly interpreted by the Board, and the Board's interpretation was again upheld by this court. In *N.L.R.B. v. Hearst Publications, Inc.*, 322 U.S. 111, the question was whether certain newsboys were employees of respondent or independent contractors. The Court rejected the holding of the court below that the question had to be determined by reference to common law standards, and its finding that by these standards, the newsboys were indepen-

[5] See, e.g., *N.L.R.B. v. Condenser Corp. of America*, 128 F. 2d 67 (3d Cir. 1942); *N.L.R.B. v. Long Lake Lumber Co.*, 138 F. 2d 363 (9th Cir. 1943); *N.L.R.B. v. Gluek Brewing Co.*, 144 F. 2d 847 (8th Cir. 1944).

dent contractors. In holding that the question was to be determined not by common-law standards but by reference to the purpose of the statute, the Court said (at pp. 126-127):

> "The mischief at which the Act is aimed and the remedies it offers are not confined exclusively to 'employees' within the traditional legal distinctions separating them from 'independent contractors.' . . .
>
> "Unless the common-law tests are to be imported and made exclusively controlling, without regard to the statute's purposes, it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation."

As the direct result of these broad holdings by the Board and the courts rejecting the common law definitions of the terms "employer" and "employee", Congress in 1947, as part of the Taft-Hartley Act (61 Stat. 136, 29 U.S.C. Sec. 151), amended Sections 2(2) and 2(3) to redefine those terms. Section 2(2) was amended to provide that the term employer should include any person acting *as an agent* of an employer, directly or indirectly; and this is the definition as it appears in the present Act (29 U.S.C. Sec. 152(2)). This change originated in the House bill (H.R. 3020) and the majority report on that bill stated the following as the purpose of the change:

> "(2) 'Employer': There are three changes in the definition of this term: (A) The old act included in the definition of 'employer' 'any person acting in the interest of an employer.' Under this language the Board frequently 'imputed' to employers anything that anyone connected with an employer, no matter how remotely, said or did, notwithstanding that the employer had not authorized what was said or done, and

> in many cases even had prohibited it.[6] By such rulings, the Board often was able to punish employers for things they did not do, did not authorize, and had tried to prevent. . . .
>
> The bill, by defining as an 'employer' 'any person acting as an agent of an employer' makes employers responsible for what people say or do only when it is within the actual or apparent scope of their authority, and thereby makes the ordinary rules of the law of agency equally applicable to employers and to unions."[7]

An analysis of H.R. 3020 inserted into the Congressional Record by Senator Murray during debate on the bill states:

> "The apparent intention of this redefinition is to change the rule, adopted by the Supreme Court in *International Association of Machinists v. N.L.R.B.* (311 U.S. 72), that an employer is responsible for the actions of his supervisory employees, even though he might not be under the strict common-law rules of agency."[8]

Congress also amended Section 2(3) to specifically exclude independent contractors and supervisors (29 U.S.C. Sec. 152(3)). The legislative history of these amendments clearly shows that they were designed to overrule the *Packard*[9] and *Hearst*[10] cases. With respect to the *Hearst* case the House Report states (p. 18):

> "An 'employee', according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for

[6] H.R. Rep. No. 245, 80th Cong., 1st Sess. 11 (1947).
[7] 93 Cong. Rec. 6660 (June 6, 1947).
[8] H.R. Rep. No. 245, pp. 13 to 18.
[9] 330 U.S. 485.
[10] 322 U.S. 111.

another for hire. But in the case of *National Labor Relations Board v. Hearst Publications, Inc.* (322 U.S. 111 (1944)), the Board expanded the definition of the term 'employee' beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic 'expertness' of the Board, upheld the Board. In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be 'employees'. The people the merchants hired to sell the papers were 'employees' of the merchants, but holding the merchants to be 'employees' of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors'. 'Employees' work for wages or salaries under direct supervision. 'Independent contractors' undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes 'independent contractors' from the definition of 'employee'."

The legislative history of the amendment of Section 2(2), the definition of "employer", reveals that Congress was most particularly concerned with restricting the Board's

power to hold employers liable for unfair labor practices committed by employees or other persons on the basis of conduct not authorized or approved by the employer. It is no less clear, however, from the history of both this amendment and the amendment of Section 2(3), that Congress was vitally interested in reversing the entire trend of liberal interpretations of "employer" and "employee" found in both Board and judicial decisions, which rejected and set aside the traditional common law meaning of those terms; and in making clear to the Board and the courts its desire and intent that "employer" and "employee" in Sections 2(2) and 2(3) as amended be given their common law meanings in the administration of the Act.

> "It is fair to say that in all this Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation. As legislation that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of application."[11]

Some of the change in mood, attitude and interpretation which Congress intended with respect to these terms seems to have been adopted by the Board.[12] However, the Board has continued to conclude in numerous cases since 1947 that respondents who are not employers of the employees involved in unfair labor practices within the common-law meaning of the term employer, are nevertheless "joint employers" and thus jointly liable with the actual employer of the employees in question. The Board, in reaching its conclusions, has not attempted to apply common-law standards but has continued to apply the discredited

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[11] *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 487.

[12] See, e.g., *Kansas City Star Co.*, 76 NLRB 384 (1948), which appears to reach a result *contra* to *Hearst Publications, Inc.*, 39 NLRB 1256 (1942).

standard of whether it is necessary to find a respondent to be an employer in order to carry out the purposes of the act. It is not suggested that there is some "simple, uniform and easily applicable test"[13] to determine who is an employer at common law; but there are well-established tests[14] and it is the Board's duty under the statute, as amended, to attempt to apply them. Instead, the Board has continued to apply criteria solely related to the purpose of the Act, with no regard for common-law standards whatsoever.

In the instant case, the Trial Examiner found that Gibraltar was not a joint employer of the employees of International but merely a creditor displaying a creditor's concern. The Board disagreed, and found them to be joint employers, basing its finding on the economic relationship between the two companies, the financial and operational control of Gibraltar over International, the ultimate control of Gibraltar over the employees involved, and the participation by Gibraltar in the unfair labor practices against International's employees. The Court of Appeals found

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[13] *N.L.R.B. v. Hearst Publications, Inc.*, 322 U.S. 111, 120.

[14] The following descriptions of the employer-employee relationship are found in Corpus Juris Secundum:

"The term employer is variously defined as one who employs; one who engages or keeps in service; one who uses or engages the services of other persons for pay; a person who has another in his employ to do certain things in a regular and successive way; a person or corporation employing workmen" (56 C.J.S. 26-27).

"The relation of master and servant arises out of contract, the assent of both parties being essential. . . . The relation does not arise between employees and one who has made advances to, or guaranteed the accounts of, the business in which they are employed, or even one who has agreed with the owner to pay the salaries of employees" (56 C.J.S. 31).

"The essential characteristic of the master and servant relation is the retention by the employer of the right to direct and control the manner in which the work shall be performed, the right to determine not merely the result but the method and means by which such result is to be accomplished" (56 C.J.S. 33).

substantial evidence in the record to sustain the Board's conclusion, stating that the control exercised by Gibraltar over the affairs of International made the employees of International *de facto* employees of Gibraltar. The court stated that the proper test as to whether Gibraltar was a joint employer with International was whether there was present unity of interest, common control, dependent operation, sameness in character of work and unity of labor relations between the separate entities involved.

Certainly, whatever validity the criteria applied by the Board and the Court of Appeals in this case may have in relation to effectuating the purposes of the Act, they are not the criteria developed at common law for determining whether one person is the employer of another. It is tacitly conceded in the opinions that Gibraltar is not the employer of the affected employees at common law. Thus the Board states in its opinion:

> "As the Trial Examiner found, Painter *did not directly supervise* the employees in their daily work. Nevertheless, contrary to the Trial Examiner, we find that Painter did exercise *ultimate* control over them." (Emphasis added.) (R.A. 3).

And the court, in its opinion, said:

> "There is ample evidence in the record showing almost complete control by Gibraltar's president, Painter, of International's affairs. It may well be, as Gibraltar argues, that such control was necessary under the circumstances to protect an investment, but notwithstanding the necessity of such control, it is evident that the employees of International from its president down were *de facto* employees of Gibraltar at the time the unfair labor practices here involved occurred. Where necessary to safeguard statutory rights, the Board may view separate legal entities as a single employing enterprise" (Appendix A, *infra*, p. 29).

It is clear that the conclusions of the Board and the Court are based largely upon the relationship between Gibraltar and International, not upon the relationship between Gibraltar and the employees of whom it is found to be the employer. The common law criteria of a consentual relationship between employer and employee and the right of employer to control the actual (not the ultimate) manner and means by which the employee's work shall be carried out are ignored.

The Courts of Appeals generally have approved the factual tests applied by the Board in determining the question of joint employership, or, as the court below, have fashioned tests of their own; and have simply applied the yardstick of substantial evidence to the Board's findings.[15]

In so doing, the courts as well as the Board have ignored the intention of Congress, evidenced by the 1947 amendments to the Act, that "employer" and "employee" should be given their common law meanings, and should not be interpreted according to the discredited tests of the *I.A.M.* and *Hearst* cases, *supra*. This case poses not a question of substantial evidence, but a question of law — may the Board, as a matter of law, find that Gibraltar, if it is not the employer of the employees involved in this case according to common law standards, nevertheless is their employer within the meaning of Section 2(2) of the Act.

The apparent intent of Congress in amending Section 2(2) was to insure as a matter of law that the Board

[15] See, e.g., *N.L.R.B. v. Dayton Coal and Iron Corp.*, 208 F. 2d 394 (6th Cir. 1953); *N.L.R.B. v. National Shoes, Inc.*, 208 F. 2d 688 (2nd Cir. 1953); *N.L.R.B. v. Concrete Haulers, Inc.*, 212 F. 2d 477 (5th Cir. 1954); *N.L.R.B. v. McCatron*, 216 F. 2d 212 (9th Cir. 1954); *N.L.R.B. v. Jones Sausage Co.*, 257 F. 2d 878 (4th Cir. 1958); *N.L.R.B. v. Norma Mining Corp.*, 206 F. 2d 38 (4th Cir. 1953).

could not make such findings. Rather, it was intended that the term employer should be given its traditional meaning and the actual employer so determined should be liable not only for unfair labor practices committed against its employees by itself, but also for those committed by any other person or company authorized to do so or placed in a position of apparent authority to do so, in accordance with the principles of agency. Under this interpretation, employees are protected fully as well as under the strained and over-reaching interpretation now applied by the Board and affirmed by the Courts of Appeals. In any case in which a person or company other than the actual employer exercises the kind of control found by the Board and the courts in the cases cited to justify a finding of joint employership, unfair labor practices committed against employees by such person or company can be laid at the feet of the actual employer under agency principles. The true employer is thus liable to remedy any unfair labor practices committed against his employees. The rights of the employees are protected. A strained interpretation of the law is avoided. Businesses may enter into contracts, leases and other agreements and arrangements which define the relationships between them, with some certainty that these agreed-upon relationships will prevail; and that they will not unwittingly become employers of someone else's employees under the vague and general factual criteria heretofore applied by the Board and the courts to these cases.

There are countless business relationships subject to the National Labor Relations Act wherein a measure of common control, either financial or operational or both, must necessarily exist because of the nature of the relationship — general contractor-subcontractor, landlord-tenant, lessor-lessee, mortgagor-mortgagee, manufacturer-distributor, to

name only a few. At this time, due to the joint-employer decisions of the Board, enforced by the Courts of Appeals, the status of many such enterprises as employers *vel non* under Section 2(2) is in doubt. The Supreme Court has not considered the meaning of Section 2(2) of the Act since its amendment in 1947. Such a consideration at this time is necessary to insure that Congressional intent is being carried out by the Board, and that the many parties to these business relationships will have a definite understanding of their rights and liabilities under the Act.

2. *The Findings Of The Board Are Not Supported By Substantial Evidence On The Record Considered As A Whole.*

The finding of the Board that Gibraltar was a joint employer with International of the affected employees is not supported by substantial evidence on the record considered as a whole, whether the criteria applied are the common-law standards or the criteria adopted by the Board and the court below. It is particularly significant in this case that the Trial Examiner who heard the testimony concluded that Gibraltar was not a joint employer. It is true, as the court below stated, that under this Court's decision in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, slavish deference by the Board to the Examiner's decision is not required (Appendix A, *infra*, p. 28). But, as the Court said at page 496 of its decision in that case:

> ". . . evidence supporting a conclusion may be less substantial when an impartial experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion."

In any case, the Trial Examiner's findings are entitled to great weight; in this case, there are compelling reasons

why they should be accorded even greater weight than in the ordinary case. The hearing in this matter was held on January 16-23, 1961 (R.A. 12). Just two months before, Painter had foreclosed on his chattel mortgage against International. A month before, he had bought the mortgaged items at public auction and had "taken over" International's operation. Just five days before, International had been placed in receivership (R.A. 53). It was obvious that because of these events, Fyle was bitter against Painter. During the hearing, the Trial Examiner found, he attempted to present Painter in as unfavorable a light as possible by the use of volunteered remarks, and slanting and withholding of answers (R.A. 19). He cooperated closely with the Board's counsel in presenting evidence at the hearing (P.A. 1-2). He did his utmost to involve Painter and Gibraltar in the alleged unfair labor practices, his object as it appeared to the Trial Examiner being not to present a clear picture but only to cloud the issues in order to give Painter and Gibraltar as much trouble as possible (R.A. 16).

His brother, Horace Fyle, according to the Trial Examiner, was intent on creating a picture of absolute control of International by its customer Gibraltar through the use of volunteered testimony, expressions of opinion and uncalled-for interpretations (R.A. 25-26).

It is quite obvious that James Fyle and his brother had much to gain by testifying in such a manner that Gibraltar would be found jointly liable with International for the unfair labor practices, and would be found to be a joint employer with International generally. International and Fyle were indebted to many creditors and it was obviously to Fyle's advantage to try to make Painter and Gibraltar liable to pay them (R.A. 16).

Under these circumstances, attitude and demeanor are of the utmost importance, and the findings of the Trial Examiner as to the worth of the testimony of these biased witnesses deserve far more weight than the findings made by the Board on the cold written record.

A perusal of the balance of the testimony reveals that the Board reached broad conclusions as to the control exercised by Painter over the personnel and operations of International from relatively few specific and isolated facts. The Trial Examiner considered all of the facts in the record with care and, giving them the relative weight which they deserved, concluded that they did not support a finding that Gibraltar was a joint employer with International. The Board, on the other hand, has based its finding entirely on those facts which support it and not upon the record as a whole. The court below erroneously found that the record considered as a whole contains substantial evidence to support the Board's finding. An independent examination of the record with due consideration for all of the evidence reveals a lack of substantial evidence to support the Board's finding that Gibraltar was a joint employer with International of the affected employees.

CONCLUSION

Because of the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Attorney for Petitioner.

December, 1962

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8548.

NATIONAL LABOR RELATIONS BOARD,
Petitioner.

versus

GIBRALTAR INDUSTRIES, INC., and INTERNATIONAL TRAILER COMPANY, INC., including Frank Sachs, Receiver of International Trailer Company, Inc.,
Respondents.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

(Argued May 30, 1962 Decided August 23, 1962.)

Before SOBELOFF, Chief Judge, and SOPER and BOREMAN, Circuit Judges.

Melvin J. Welles, Attorney, National Labor Relations Board, (Stuart Rothman, General Counsel; Dominick L. Manoli, Associate General Counsel; Marcel Mallet-Prevost, Assistant General Counsel, and Gary S. Green, Attorney, National Labor Relations Board, on brief) for Petitioner, and Howard DeMuth, Jr., (George E. Brown, Jr., on brief) for Respondents.

BOREMAN, Circuit Judge:

The National Labor Relations Board, in accord with section 10(e) of the National Labor Relations Act, 61

Stat. 136, 147 (1947), as amended, 29 U.S.C.A. § 160(e) (1961 Supp.), petitions the court for enforcement of its order of October 30, 1961, issued against International Trailer Company, Inc., and Gibraltar Industries, Inc., as joint employers. It is conceded that International engaged in certain unfair labor practices, including the discharge of several employees because of their union activities. The sole issue here is whether the Board properly found that Gibraltar Industries, Inc., was a joint employer with International of the affected employees and thus jointly subject to the remedial portion of the Board's order.

Though there is no substantial dispute as to the evidentiary facts, Gibraltar challenges some of the Board's inferences and the ultimate conclusion drawn from those facts. International, wholly owned by its president, James Fyle, had been engaged for several years in the manufacture of mobile homes and commercial trailers at its plant in Baltimore, Maryland. At the time of the hearing in January 1961, International was insolvent and in receivership in a state court. On December 2, 1960, International ceased doing business and a few days thereafter all former International employees went to work for Gibraltar doing exactly the same work they had done for International.

In December 1958 Gibraltar was formed by Charles Frederick Painter and E. B. Jeffress to engage in business as a wholesale mobile-home dealer. James Fyle became Gibraltar's secretary and a holder of two per cent of its stock. On January 1, 1960, Painter bought Jeffress' interest in Gibraltar and thus became the owner of ninety-eight per cent of that corporation's outstanding stock. Shortly after Gibraltar was organized, it executed, with Painter individually and with International, a contract whereby International agreed to sell all the mobile homes it produced to Gibraltar which, in turn, agreed to buy all its mobile homes from International. Painter agreed to provide International with working capital and to indemnify its suppliers. The agreement was subject to termination upon terms and conditions not here relevant:

it had not been terminated at the time International went out of business.

Apparently because International was so critically short of working capital, it was unable, soon after executing the 1958 agreement, to meet the production quota established therein and Painter was dissatisfied with the workmanship and the quality of the finished products. In early 1959 Gibraltar established offices on International's premises. Painter moved into offices adjoining Fyle's office and a "Gibraltar" sign was placed over that corporation's office door. Both Painter and Gibraltar began advancing large sums of money to International. In June 1959, Fyle endorsed all his shares of International stock—the total outstanding issue—to Painter, who was also given a chattel mortgage on most of International's equipment.[1] A written hypothecation instrument was executed by Fyle with respect to the "assignment" of the International stock which permitted Painter to sell the shares in accord with the terms of a note to be signed by International as evidence of the loan. The record does not indicate that such a note was ever executed, and Fyle testified that when he turned the stock over to Painter, he relinquished control of International and never expected to have the stock returned to him. Painter testified that he took the stock in addition to a chattel mortgage on International's equipment as security for the loans to International.

By June 23, 1959, when the stock "assignment" was made, Painter had access to all International books and records and, according to Fyle, it was Painter who completely controlled International. But during the ensuing months International's financial condition became worse despite Painter's aid. In October 1959 International's bank refused to permit Fyle to draw any more checks on the corporation's account. For a few months International was permitted to retain a checking account with Painter as

[1] In November 1960, about a week after the complaint was issued in the instant case, Painter began foreclosure proceedings. The following month Painter bought at public auction all the items covered in the mortgage, which constituted virtually everything International owned

a guarantor, but after February 1960 International's account was discontinued entirely; thereafter the company had no bank account.

Although the 1958 agreement required only Painter's personal indemnification of International's suppliers, Gibraltar began in early 1960 (right after the closing of International's bank account) to pay the suppliers directly, taking credit for such amounts against future delivery of mobile homes. Eventually purchases of materials for the use of International were made directly on Gibraltar purchase orders. Painter, in February 1960, began advancing cash to meet International's weekly payroll and this procedure continued through the remaining months that International was in business. Other funds were advanced to pay for all insurance carried by International, including workmen's compensation insurance for all the corporation's employees. In the early summer of 1960, when International's credit had become suspect among dealers and suppliers, the "International" sign was removed and a "Gibraltar" sign was installed over the door of *International's offices*. Also, Gibraltar's name, instead of International's, began appearing on the completed mobile homes.

Early in 1960, International was about $8000 in arrears in its rent when the owner of the premises demanded a guarantee of payment by a responsible party. Painter assumed liability for the payment of the back rent and advanced funds each month for the current rent. In August 1960 International's lease expired and Gibraltar took it over, retaining the right to terminate it upon sixty days' notice to the landowner.

As Painter and Gibraltar gained financial control over International, Painter himself commenced direct participation in the actual operations of International's business. The 1958 agreement authorized Painter to inspect International's inventory and production records and to refuse to guarantee payment of suppliers when in his discretion inventory was in excess of production needs. After Painter became Gibraltar's dominant stockholder in January 1960 he began to make frequent appearances at International's

production line, inspecting the work, making suggestions and ordering changes which he thought necessary or desirable. He sometimes appeared at meetings of supervisors and group leaders and in other ways exerted his influence over the details of the production processes.

There are several instances where Painter exercised control over International's employees. In June 1959 he decided that the plant superintendent who had worked for International a number of years was not capable and should be replaced. Wayne Stutsman was employed as the new plant superintendent, according to the Board's findings, at the instigation of Painter. At one point Fyle noticed that he, as president of International, was receiving less compensation for his work than was the plant superintendent and decided to give himself a raise of $50 per week. In the discussion that followed, Painter told Fyle that he (Fyle) was not as valuable an employee as the plant superintendent; Fyle did not receive the raise he had intended. International's controller, who had been selected and employed by Painter to guide Fyle's purchasing policies, looked to Painter for a salary increase. Over Fyle's objection, Painter determined that Fyle's former secretary should not be rehired. In the summer of 1960 Painter's personal airplane pilot was made purchasing agent for International though he remained on Gibraltar's payroll. Leroy McDonald, paint foreman for International testified that he wanted to quit his job but that Painter persuaded him to stay and gave him a raise. Painter further manifested his control over International's affairs by dismissing the purchasing agent employed by International (prior to appointing his pilot for the job) and on another occasion by telling Stutsman to hire a particular boy as a painter.

In May 1960 Fyle prepared a classified advertisement seeking craftsmen needed for International's production line. Upon Painter's order, however, the advertising copy was changed by substituting Gibraltar's name in the text instead of that of International.

The Board, upon the basis of the economic relationship between Gibraltar and International, the control Gibraltar exercised over the employees of International, and the active participation of Painter in the unfair labor practices (which concededly did occur with Painter's knowledge, consent and encouragement), disagreed with the Trial Examiner's finding that Painter's conduct "merely displayed a creditor's concern." The Board reversed the Examiner's amendment of the complaint by which he had eliminated the allegation that International's employees were also employees of Gibraltar. It found Gibraltar and International to be joint employers.[2]

We are of the opinion that there is substantial evidence in the record to support the Board's conclusion and order imposing joint and several liability on both corporations for the unfair labor practices found. Gibraltar contends that it and International are separate legal entities and that since the unfair labor practices were against International employees by the management of International, it (Gibraltar) should not be jointly liable for the remedial portion of the Board's order. It is also urged that Gibraltar was not a joint employer of the affected employees because (1) neither Gibraltar nor its principal stockholder, Painter, *owned* any stock in International; (2) Painter was not an officer or director of International; (3) each corporation maintained separate offices though in the same building; (4) each corporation kept its own books and records; (5) Gibraltar paid rent to International; (6) each corporation had its own employees; (7) the two corporations had a contractual arrangement under which each operated with respect to the other; (8) all funds

[2] The Supreme Court in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496-97 (1951), made it perfectly clear that slavish deference by the Board to the Examiner's decision is not required. In the instant case the Examiner found James Fyle a biased witness and placed little confidence in his testimony. The Board's findings do not depend to any substantial extent on Fyle's credibility, however. In reviewing the whole record, we have examined and considered the Trial Examiner's Intermediate Report, but in our opinion the Board was justified in rejecting part of that Report and the Examiner's recommendation with respect to the amendment of the complaint.

advanced by Gibraltar to International were charged against the future delivery of trailers to be built; (9) Painter and Gibraltar were not the only creditors of International in substantial amounts; and (10) the concern and interest manifested by Painter and Gibraltar in International's work product was only that of any purchaser who was obligated to buy the product for resale. We do not find these arguments persuasive. There is ample evidence in the record showing almost complete control by Gibraltar's president, Painter, of International's affairs. It may well be, as Gibraltar argues, that such control was necessary under the circumstances to protect an investment, but notwithstanding the necessity of such control, it is evident that the employees of International from its president down were *de facto* employees of Gibraltar at the time the unfair labor practices here involved occurred. Where necessary to safeguard statutory rights, the Board may view separate legal entities as a single employing enterprise. See *NLRB* v. *Jones Sausage Co.*, 257 F. 2d 878 (4th Cir. 1958); *NLRB* v. *Williams*, 195 F. 2d 669 (4th Cir.), *cert. denied*, 344 U.S. 834 (1952). In *Williams*, the court, considering two closely-related businesses as constituting an appropriate single bargaining unit, stated that the test for determination of that issue is whether there are present unity of interest, common control, dependent operation, sameness in character of work and unity of labor relations between the separate entities involved. We approve the application of the same test in deciding the issue in the case at bar and reach the conclusion that Gibraltar was properly found to be a joint employer with International. The Board is entitled to consider *de facto* control in ordering remedial action by a party exercising such control in a manner which violates the National Labor Relations Act. See *NLRB* v. *Dayton Coal & Iron Corp.*, 208 F. 2d 394 (6th Cir. 1953).

Enforcement granted.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8548.

NATIONAL LABOR RELATIONS BOARD,
Petitioner.

versus

GIBRALTAR INDUSTRIES, INC., and INTERNATIONAL TRAILER COMPANY, INC., including Frank Sachs, Receiver of International Trailer Company, Inc.,
Respondents.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Gibraltar Industries, Inc., and International Trailer Company, Inc., their officers, agents, successors and assigns, including Frank Sachs, Receiver of International Trailer Company, Inc., his agents, successors and assigns on the 30th day of October, 1961, in a proceeding before said Board known upon its records as Case No. 5-CA-1796; upon the answer of respondent Gibraltar Industries, Inc.; upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel. At the request of the Court, the transcripts of testimony were made available to it.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the petition for enforcement be, and it is hereby, granted, and that said Gibraltar Industries, Inc., and International Trailer Company, Inc., their officers,

agents, successors and assigns, including Frank Sachs, Receiver of International Trailer Company, Inc., his agents, successors and assigns abide by and perform the directions of the Board in said order contained.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

MORRIS A. SOPER,
United States Circuit Judge.

HERBERT S. BOREMAN,
United States Circuit Judge.

Filed, Aug. 23, 1962.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136-162, 29 U.S.C. Sec. 151 *et. seq.* provide as follows:

> "Sec. 2(2). The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."
>
> "Sec. 2(3). The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

These provisions appeared as follows in the original National Labor Relations Act, 49 Stat. 449, prior to the 1947 amendments:

"Sec. 2(2). The term 'employer' includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

"Sec. 2(3). The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."